

No 4302 Equity

all equal, taking into consideration the amount advanced to each. To four of his children he leaves nothing, because, as he states, "they have already received their equal share. He then says, "my heirs shall sell all my real estate whenever they shall agree, to the best advantage to pay the foregoing legacies". The will then provides, "that in case my estate should not reach the foregoing legacies, then an equal deduction shall be made from their respective shares, but in case it should exceed the foregoing bequests, then the balance of excess shall be equally divided among all my children share and share alike". From these provisions of the will, it seems to very clear that the testator intended to make a certain provision for his wife in lieu of her dower in his estate, and this is manifest from the language of the instrument.

He gives her a specified, ascertained amount to be paid out of the real estate, when his heirs should agree that it would be best to sell it, whereas the amount each child should receive was uncertain, and dependent upon what the real estate might realize. He says his "heirs" shall sell his real estate when they shall agree, thus vesting the power to sell, exclusively in the heirs, and not requiring the consent or agreement of the widow. Here by the word "heirs," the testator meant children, as he does not seem to have fully understood the legal effect of the terms used, because he sometimes used the words legacy, and share as synonymous. It is evident from the wording of the will, that the testator meant to give each of his children an equal share of his estate. This idea is prominent throughout the will, as evidenced by his giving to different children, different sums so as to equalize them, having in view the sums advanced to each. He says, in case my estate should not reach the foregoing legacies, then an equal deduction shall be made from their respective shares."

The testator having the intention to give his children an equal share of his estate, when he said "an equal deduction shall be made from their respective shares," meant that the deduction should be from what he willed to the children, that is from their share and not from all the legacies.

Again he says, but in case it should exceed the foregoing bequests then the balance of excess shall be equally divided among all my children share and share alike", including the children to whom he had advanced their full shares. He thus excludes the widow from any participation in the excess, thereby showing that he did not intend a division of the estate among his children and widow. And showing also that he did not intend his widow should lose or gain by what the real estate should bring; and it would be unjust so to construe the will, as to make the widow lose by a depreciation in the estate, and prohibit her from gaining by its appreciation. Thus the Court ought not to do, unless forced to do so by the language of the will. And to use a common, but truthful and expressive phrase, "it is a bad rule that don't work both ways." Under our testamentary system, every devise to a widow, (unless in effect nothing shall pass by such devise) is construed as intended as a bar of dower, and operates as such if the devise within the time specified by law, does not renounce all benefit under the will. Gough & wife vs Manning. 2 G. M. d. 366.

Courts And
allowance
widow
Legacy
full

Trustee
2d Rep